

2-9-1976

# Jay Bederman v. Nationwide Insurance Company and Fireman's Fund-American Insurance Company

Appellant's Brief 1975-SC-1180

# APPELLANT'S BRIEF

# SUPREME COURT OF KENTUCKY

No. 75-~~1181~~ 1180

**JAY BEDERMAN** - - - - - - - **Appellant**

*versus*

**NATIONWIDE INSURANCE COMPANY**
**and**
**FIREMAN'S FUND-AMERICAN**
**INSURANCE COMPANY** - - - - **Appellees**

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, FIRST DIVISION
HON. MICHAEL O. McDONALD, JUDGE

## BRIEF FOR APPELLANT



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This is to certify that a copy of this Brief for Appellant was served upon Mr. James E. Hickey, Attorney for Nationwide Insurance Company, Commonwealth Building, Louisville, Kentucky; Mr. Kenneth Anderson, Attorney for Fireman's Fund-American Insurance Company, Kentucky Home Life Building, Louisville, Kentucky, and on Hon. Michael O. McDonald, Trial Judge, this 6 day of February, 1976.

*Attorney for Appellant*

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*May it please the Court:*

## II. STATEMENT OF QUESTION PRESENTED

Is the "physical contact" requirement in the "hit-and-run" clause of the uninsured motorist provision of the automobile liability policies in question in derogation of KRS 304.20-020?

## III. STATEMENT OF THE CASE

### (A) Nature of the Proceedings

This action involves an automobile accident which occurred on October 23, 1973 (Transcript of Record, hereinafter referred to as T.R., 3-4). The Appellant, who was the Plaintiff in the court below brought the action in the Jefferson County Circuit Court, Common Pleas Branch, First Division, the Honorable Michael O. McDonald presiding, against Charles Treston, Corine

Skeeters Hampton and an unknown driver of a pick-up truck, the other drivers of motor vehicles involved in the accident. The action was also brought against Nationwide Insurance Company (hereinafter referred to as Nationwide) and Fireman's Fund-American Insurance Companies (hereinafter referred to as Fireman's Fund) because each had issued an automobile liability policy to the appellant containing uninsured motorist coverage. These policies were in full force and effect at the time of the accident in question.

Summary Judgments were entered in the court below on October 29, 1975, dismissing the complaint of the appellant against the insurance companies aforementioned and it is these judgments from which this appeal is taken. The only parties to this appeal are the appellant and the insurance companies aforementioned.

Pursuant to CR 76 the parties to this appeal entered into an Agreed Statement of the case containing all of the matters considered essential to a determination of the questions presented by this appeal without an examination of all the pleadings, evidence, and proceedings in the court below. The Agreed Statement was entered on October 30, 1975, and the Notice of Appeal was filed on November 6, 1975. The appeal was docketed on December 31, 1975.

### (B) Statement of Facts

As described in the Agreed Statement (TR 5-8) the subject accident occurred when the Treston vehicle swerved to avoid contact with an unknown pick-up truck and collided with the Hampton vehicle. As a

result of this collision the Hampton vehicle went out of control and struck the vehicle being driven by the Appellant. Since the pick-up truck did not stop at the scene of the accident its identity and that of its driver are still unknown. All parties to this appeal agree that the driver of the pick-up truck was negligent and that his negligence was a substantial contributing cause of the accident involving Appellant's automobile. It is also agreed that the truck did not come into physical contact with any of the other vehicles involved in the accident.

The appellees, Nationwide and Fireman's Fund had each issued a policy of automobile liability insurance coverage containing uninsured motorist coverage on the vehicle which the Appellant was operating at the time of the accident in question. The uninsured motorist limits of liability under each policy is ten thousand dollars ($10,000.00) per person (and twenty thousand dollars ($20,000.00) per accident). It should be noted that the extent of actual liability of each appellee is not an issue on this appeal as this issue is yet to be determined.

The action was filed against the aforementioned insurance companies on the ground that they were liable to the appellant under the uninsured motorist provisions of their respective policies because the unidentified pick-up truck was a "hit-and-run automobile". Appellees denied liability on the ground that the "hit-and-run" provisions of their uninsured motorist coverage were not applicable because there was no physical contact between the pick-up truck and any of the other vehicles involved in the accident.

The policies in question contain similar standard clauses relating to uninsured motorist coverage.

Nationwide's policy provides in pertinent part as follows:

> "Damages for Bodily Injury Caused by Uninsured Automobile".
>
> "The Company will pay all sums which the Insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called (bodily injury), sustained by the Insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile." (Between TR-8 and TR-9; Nationwide Policy, page 11).

The policy states that an "uninsured automobile" includes a "hit-and-run-automobile" as defined and defines "hit-and-run-automobile" as follows:

> "an automobile which causes bodily injury to an Insured *arising out of physical contact of such automobile with the insured* or with an automobile which the Insured is occupying at the time of the accident, provided: (1) there cannot be ascertained the identify of either the operator or owner of such 'hit-and-run automobile' (2) the Insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the Company within 30 days thereafter a statement under oath that the Insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and (3) at the Company's request the Insured or his legal representative makes available for

inspection the automobile which the Insured was occupying at the time of the accident" (Id., page 12).

Fireman's Fund's policy relating to uninsured motorist coverage is substantially similar to Nationwide's. It also provides that an "uninsured automobile" includes a "hit-and-run automobile" and defines "hit-and-run automobile" in virtually identical language. (Between TR-8 and TR-9, Fireman's Fund Policy, page 3).

It is undisputed that both policies provide that the uninsured motorist coverage is not applicable to a hit and run vehicle when there is no physical contact between the hit-and-run vehicle and any other vehicle involved in an accident.

## IV. ARGUMENT

Kentucky's uninsured motorist statute is K.R.S. 304.20-020. It prohibits delivery or issuance for delivery of an automobile liability policy unless minimum statutory coverage is provided for bodily injury or death

> *"for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom."* (unless the insured rejects the coverage in writing).

As will be noted Kentucky's uninsured motorist statute is a common form. It serves a remedial purpose of enabling the purchaser of insurance to protect himself from loss in a situation where recovery would otherwise

be impossible because the owner or operator of the vehicle which negligently caused the injury is unable to respond in damages.

Under the long established rule provisions required by statute are treated as being part of a policy the same as if expressly written therein. This principle has been applied specifically to statutorily required uninsured motorist coverage. *Meridian Mutual Insurance Company* v. *Siddons,* Ky., 451 S.W.2d 831 (1970). It is Appellant's contention that a physical contact requirement relating to "hit-and-run" automobiles as contained in the uninsured motorist provision of an automobile liability policy unnecessarily restricts uninsured motorist coverage and thereby violates the purpose and spirit of Kentucky's uninsured motorist statute.

This is a case of first impression in Kentucky. Therefore the historical perspective of KRS 304.20-020, its clear purpose, opinions from other jurisdictions and the views of legal writers in the field take on an added significance.

While courts have traditionally upheld the validity of an insurance policy provision requiring physical contact recent developments have established a national trend away from this approach. Since 1971, Florida, Alabama, Washington and Hawaii have eliminated the physical contact requirement by judicial interpretation. Oregon has done so by statute. Ore. Rev. Stat. §743.792(2)(g) (1973). Other states, such as Arizona, have expressed doubt as to the wisdom of the requirement and appear to be moving toward elimination. Intermediate courts in other states have eliminated the

physical contact requirement and a United States District Court interpreting New Mexico's uninsured motorist statute held the requirement violative of it.

Florida eliminated the requirement in *Brown* v. *Progressive Mutual Insurance Co.*, Fla., 249 So.2d 429 (1971). Here recovery was allowed the insured where the "hit-and-run" vehicle caused the insured's vehicle to run off the road but did not make contact with it. The Court looked to Florida's uninsured motorist statute (Fla. Stat. §627.0851 F.S.A.) which is substantially similar to KRS 304.20-020 and concluded that the physical contact requirement unnecessarily restricted the scope of the statute. The court at page 430, said:

> ". . . (1) The purpose of the uninsured motorist statute is to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party. The statute is designed for the protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others. The effect of (appellant's contention) is to place on the injured person in every case the burden of proving that the offending party was without insurance regardless of the circumstances, the equities or the difficulties. Failure on the part of the injured party to make such proof results in nonrecovery, and the certainty that in some cases at least, injured persons then become the burden of society or of the state, despite their attempt to protect themselves by purchase of insurance intended to shield them against damages inflicted by a party from whom recovery cannot be made in person or through his insurance . . .
>
> . . . (3) The argument that the policy requirement of physical contact is reasonable is fallacious.

> The only reason for such a requirement is to prove that the accident actually did occur as a claimant may say it did. This is a question of fact to be determined by the jury or the judge if demand for jury trial is not made. If the injured party can sustain the burden of proof that an accident did occur, he should be entitled to recover, regardless of the actuality of physical contact. If twenty witnesses will swear they saw the accident happen, their testimony should not be deemed worthless, as it would be under the decision here for review . . .".

Quoting extensively from the Florida opinion the Alabama Supreme Court eliminated the physical contact requirement in *State Farm Fire & Casualty Co.* v. *Lambert*, Ala., 285 So.2d 917 (1973) (hereinafter referred to as *Lambert*). This decision is particularly relevant because the Alabama statute under review is also virtually identical to KRS 304.20-020. Neither statute makes specific mention of the "hit-and-run" vehicle or the "physical contact requirement". The Alabama court examined the historical context surrounding the passage of the statute and declared that the statute was designed to allow recovery whenever the insured could prove he had been injured by the negligent action of a "hit-and-run" driver. Given this legislative design the Court rejected the fraud argument and held at 920 that "the physical contact requirement in the 'hit-and-run' provision of the automobile liability insurance policies . . . is in derogation of the Alabama Uninsured Motorist Statute (Title 36 §74(62a), Code of Alabama 1940 (Recomp. 1958), as amended) and is void as against public policy."

The Alabama decision is quite significant because of the similarity between the Alabama and Kentucky un-

insured motorist statutes both in phraseology and historical perspective. Prior to the enactment of the uninsured motorist statutes both states passed statutes providing in substance that those who were unable to respond to damages caused by their own negligence in the use and maintenance of an automobile would be subject to the loss of their driving privileges (See §§74(42)-74(83), Title 36, Code of Alabama 1940 (Recomp. 1958; KRS 187.410). The Alabama Court explains the effect of this statute and the following enactment of its uninsured motorist statute at 919 as follows:

> "While this policy tended to develop an ever increasing consciousness on the part of the motoring public for the need of financial responsibility to third parties, the practical effect was nonetheless to leave a substantial number of the motorists uninsured and financially irresponsible.
>
> " A progressive and an imaginative insurance industry moved into this gap and provided, as optional coverage, uninsured motorist protection. The responsibile motorist was now able for a nominally increased premium to cover not only his liability to others, but to protect himself from loss due to personal injury incurred through the fault of the financially irresponsible. These irresponsible motorists fall basically into two categories—the known driver and the unknown driver (hit-and-run). While the gap was narrowed, it was not fully bridged. Two deficiencies yet remained: (1) the uninsured motorist coverage was purely contractual and thus wholly optional, and (2) by the terms of the policy the insured's protection against hit-and-run drivers was conditioned on physical contact of the vehicles involved. In light of this historical perspective, and working within the traditional fault concept, the

> legislature passed the Uninsured Motorist Statute. By requiring each policy to include such coverage—absent an express disavowal on the part of the insured—the gap represented by the first deficiency was further narrowed. It is equally clear that the statute in providing 'for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles' speaks directly to the second deficiency—the unknown or hit-and-run as well as the known financially irresponsible driver.
>
> "To hold that the legislative intent had the restrictive effect of speaking only to the first of the two above referred to deficiencies is to dispute that the purpose of the statute is to protect persons who are injured through the fault of other motorists who in turn are not insured and cannot make whole the injured party. The design of the statute is to protect injured persons who can prove that the accident did in fact occur and that he was injured as a proximate result of the negligence of such other motorist who cannot respond in damages for such injuries. Moreover, the statute permits the enforcement of the policy provisions by the insured directly against the insurer without first obtaining a judgment against the uninsured."

Kentucky's uninsured motorist statute is similar to Alabama's in phraseology, substance, historical perspective, and it was passed with similar legislative designs. The physical contact requirement is as repugnant to Kentucky's statute as the Alabama Supreme Court concluded it was to the Alabama statute.

Washington eliminated the physical contact requirement in *Hartford Accident and Indemnity Company* v. *Novak*, 83 Wash.2d 576, 520 P.2d 1368 (1974). In this

case a second vehicle swerved to avoid contact with the "hit-and-run" vehicle and collided with the insured. The Washington Statute under review was different from the statutes hereinbefore discussed since it contained a "hit-and-run" provision (but made no mention of physical contact). The court concluded that the physical contact requirement is void as against public policy on two grounds. First, the state has a special interest in seeing coverage extended in those situations where recovery would otherwise be impossible; if coverage is not so extended, the insured may become a financial burden on the state. Secondly, since the purpose of the uninsured motorist statute is to expand coverage but the physical contact requirement inevitably restricts coverage, the requirement is contrary to public policy expressed in the statute.

The Washington Supreme Court sees the basic unfairness of the physical contact requirement as another reason for eliminating it. An insured purchases this coverage in order to protect himself in the event he is negligently injured by someone from whom he is unable to recover. It seems unfair to refuse him coverage when precisely the event against which he is trying to protect himself against occurs. Regardless of whether or not there is physical contact the insured has suffered a loss because of the impossibility of recovering from the tortfeasor.

Following the lead of the decisions hereinbefore discussed Hawaii eliminated the physical contact requirement in *Demelo* v. *First Insurance Company of Hawaii, Ltd.*, 523 P.2d 304 (Hawaii 1974). Hawaii's uninsured motorist statute is also virtually identical to Ken-

tucky's. As in the decisions hereinbefore discussed Hawaii found the prevention of fraud argument fallacious and found the physical contact requirement contrary to the protective purpose of the uninsured motorist statute.

A United States District Court construed the similar New Mexico uninsured motorist statute and likewise held the physical contact requirement inconsistent and therefore invalid, *Montoya* v. *Dairyland Insurance Company*, 394 F.Supp. 1337 (D.C.N.M. 1975). Relying on the decisions hereinbefore cited and the general reasoning hereinbefore discussed the Court concluded that although the New Mexico Supreme Court had never decided the issue it appeared that the Hawaii high court would hold the "physical contact requirement" invalid as the state legislature did not intend to allow the creation of a gap in the uninsured motorist coverage.

In addition to the states outlined above where the physical contact requirement has clearly been eliminated there is question about the status of the requirement in Arizona after the decision in *Mazon* v. *Farmers Ins. Exch.*, 13 Ariz. App. 298, 475 P.2d 957 (1970). The Arizona Supreme Court specifically refused to rule on the status of the requirement and in the fact situation involved there was some physical contact between the "hit-and-run" vehicle and the insured in the form of a rock thrown intentionally from the hit-and-run vehicle. However in finding for the insured the Court notes the rigidity of the physical contact requirement, unjustifiable in terms of its original intent to prevent fraud.

Some state intermediate courts have ruled against the physical contact requirement. Of particular interest

is *Webb* v. *United Services Automobile Association*, 227 Pa. Super. 508, 323 A.2d 737 (1974) which considered the Pennsylvania uninsured motorist statute and found the physical contact requirement violative of it. Pennsylvania's statute, like Florida's, Hawaii's, Alabama's, New Mexico's and Kentucky's does not specifically mention the "hit-and-run automobile" or "physical contact". See also *Farmers Insurance Exchange* v. *McDermott*, 527 P.2d 918 (Colo. App. 1974); *Balestrieri* v. *Hartford Accident and Indemnity Insurance Co.*, 22 Ariz. App. 255, 526 P.2d 779 (1974).

The precedential value of the cases outlined above is considerable. Most of them considered statutes virtually identical to Kentucky's. Moreover the value of the cases is enhanced by the concensus with respect to the fallacy of the fraud argument and the basic unfairness of the physical contact requirement to the insured.

The jurisdictions that have dealt with the physical contact issue are not unanimous. Many states have decided that a physical contact clause is valid. However most of these cases have been decided within easily distinguishable statutory contexts. Certain state statutes (in contrast to Kentucky) explicitly require physical contact so that a claim such as presented here could not arise. Other cases come down hard on the words "hit-and-run" in the statute, a provision not found in the more general Kentucky statute.

In addition to the judicial decisions set forth above, leading scholars dealing with the insurance area conclude unanimously that the courts should and have a duty to provide coverage even where there is not contact so long as the purpose of the hit-and-run statute is met, and such purpose is to prevent fraud and collusion.

In his book entitled "*The Guide to Uninsured Motorist Coverage*" Professor Widiss states in his discussion of hit-and-run accidents the following pertinent quotes:

At p. 82, Sec. 2.41,

> "Some standard of corroboration to support a claimant's contention that the injuries for which he seeks compensation were indeed caused by a hit-and-run motorist is clearly appropriate, but the effect of requiring actual touching is highly questionable."

At p. 83, Sec. 2.41,

> "Essentially, these decisions hold that the purpose of the physical contact requirement is to prevent abuses resulting from fraud and/or collusion, not to defeat claims by the victims of negligent, unidentified hit-and-run motorists where no fraud exists."

At p. 85, Sec. 2.41,

> "In the view of this writer, a reconsideration of the appropriateness of the physical contact rule in its entirety is more than warranted. This is not to say that the proverbial flood gates to fraudulent claims should be opened."

At p. 86, Sec. 2.41,

> "It seems unreasonable to establish a rule under which recovery is possible if there is a minute scratch on the insured's car, but no impartial witnesses—and to deny all rights where there was no contact, even though there are many witnesses and there is no reason to suspect collusion or fraud."

The physical contact requirement is put lucidly into focus in Vol. 32 of the American Trial Lawyers Journal at page 347 where it states:

> "There are certain fact situations where the requirement of physical contact has no logical application such as where there are disinterested witnesses who will testify as to the hit-and-run car forcing the plaintiff from the road."
>
> "In such a case who would contend, notwithstanding the language of the endorsement, that the accident was not caused by a hit-and-run driver."

In addition, as Mr. Gerald Asken, General Counsel of the American Arbitration Association has observed in his article "Arbitration of Uninsured Motorist Endorsement Claims", 24 Ohio St. L.R. 602 (1963):

> "Certainly where a legitimate claim is made out and factual causation is proved the policy exclusion of physical contact should fail, arbitrators when allowed to rule on this question have applied the doctrine of proximate cause and granted the appropriate recovery to the insured for his injuries."

Under the facts of the case at hand it is stipulated by all parties to this appeal that the "hit-and-run" pick-up truck existed and that his negligence was a substantial contributing cause of the accident involving Appellant's vehicle. There is no question of fraud involved. It would be unduly harsh to deny Appellant recovery solely because the phantom vehicle did not touch or otherwise come into contact with any other vehicle involved in the accident. Such contact would not make appellant's injuries any more real or his cause any more just.

Taking the physical contact requirement to its harsh conclusion, it seems extremely bizarre that in this day and age when we are constantly teaching defensive driving and safety on the road that the insurance companies should be permitted to require that people deliberately avoid taking evasive action and thereby make contact with a motor vehicle being negligently driven so as to provide coverage for injuries that may be the result of an accident. Such a senseless requirement is clearly against the public policy, purpose and spirit of KRS 304.20-020 as expressed, "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . ."

## CONCLUSION

The issue in this case should be resolved by a determination that physical contact is not required. The insured who is injured by a hit-and-run driver should not be held to a forfeiture of insurance coverage because he avoided physical contact with a tortfeasor. It has never been the policy of this state to impose such a forfeiture, or to adopt a rule contrary to the remedial purposes of a statute.

The consumer who purchases uninsured motorist coverage is entitled to the protection that fairly and logically should be obtained. Where injury is caused by another, and the insured can show he is legally entitled to recover damages, recovery should be allowed without imposition of artificial requirements.

This court is strenuously urged to reverse the summary judgments entered in the Court below and to re-

mand the cause to the Circuit Court with instructions to enter summary judgments against the Appellees on the question of liability, leaving the question of damages open for determination.

Respectfully submitted,

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